Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1998

ELLEN R. HIBBLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 24, 1998

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QUESTIONS PRESENTED

I. Did the trial court err in dismissing petitioner's action pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction where plaintiff established that the government failed to warn her of a known, hidden danger, and failed to follow its own policy requiring repairing the hazard or posting warning signs?

II. Where the federal government is a landowner, is it immune from suit under the discretionary function exception to the Federal Tort Claims Act, where it fails to warn an invitee of a known, hidden danger, and no broad, public policy considerations exist to obviate the duty to warn?

III. Is a written operational guide to the maintenance of Arlington National Cemetery, which mandates the prompt repair of dangerous walk-ways, or the posting of appropriate warnings and barriers, sufficient to satisfy the "written policy" requirement of the *Berkovitz-Gaubert,* removing discretion from the public official?

IV. Where the government responds to a discovery request for "policies concerning maintenance and repair of walk-ways" by providing a document directing the prompt repair of dangerous walk-ways, or the posting of appropriate warnings and barriers, may the government later argue that the document is not its official policy, but merely a "guiding document" which it can choose to ignore?

LIST OF PARTIES

The parties to this action are petitioner, Ellen R. Hibble, and respondent, the United States of America.

Petitioner is an individual and has no parent or subsidiary companies.

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Ellen R. Hibble, by her counsel, respectfully petitions for a writ of certiorari to the review the judgment of the United States Court of Appeals for Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported, and reproduced at Appendix A. The memorandum opinion and order of the United States District Court of the Eastern District of Virginia is likewise unreported, and is reproduced as Appendix B. The Fourth Circuit's denial of petitioner's motion for rehearing, or in the alternative, suggestion for rehearing en banc, is reproduced as Appendix C.

JURISDICTION

This petition seeks review of a decision of the Court of the Appeals for the Fourth Circuit entered on January 7, 1998. On January 21, 1998 petitioner filed a motion for rehearing and suggestion for rehearing en banc. The motion for rehearing and suggestion for rehearing en banc was denied on March 27, 1998, 1998. The petition follows.

STATUTORY PROVISIONS INVOLVED

1. The *Federal Tort Claims Act* ("FTCA") provides as follows in pertinent part:

> **28 U.S.C. § 2674. Liability of United States.**
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> * * *
>
> With respect to any claim under this chapter [28 USC §§ 2671 et seq.], the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.
>
> **28 U.S.C. § 2680. Exceptions**
>
> The provisions of this chapter [28 USC §§ 2671 et seq.] and section 1346(b) of this title shall not apply to--
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal

agency or an employee of the Government, whether or not the discretion involved be abused.

2. *Army Pamphlet* 290-5 contains the Arlington National Cemetery's provisions with regard to the maintenance of drives, walkways and drains. It reads in pertinent part:

5-4. Roads, drives, walks, and drains

b. Cemetery drives and walks must not present a hazard to vehicles or pedestrians. They, will be kept free of potholes and mounds. Cracks will be filled with joint compound to arrest deterioration and postpone major repairs. If immediate repairs cannot be made, barriers will be erected or other steps taken to prevent accidents.

c. Curbs and gutters shall be repaired to prevent water from getting under the road surface and to prevent raveling of surface treatment.

g. Specific authorization will be obtained from the Superintendent before placing signs within the cemetery. These include directional and special informational signs necessary for guidance of the public. The proposed sign, its location, design, and size, as well as justification for the sign, will be submitted. The foregoing will not apply to temporary signs necessary to warn the public of a hazard, or restricted areas.

STATEMENT OF THE CASE

The government knew for several years that the "Custis Walk," a particular walk-way at the Arlington National Cemetery, had deteriorated to the point of becoming a known danger to pedestrians. Experts from the Army Corps of Engineers, various engineers in private practice, and

Cemetery's safety director, had all declared the walk-way a "trip hazard."[1]

Despite this knowledge, the government failed to warn the public of the danger, even though leaves covered the walk in the fall and winter, obscuring the hazard. While visiting her parents graves at Arlington, pursuant to a special use permit issue to her by the Superintendent of the Cemetery, petitioner slipped on the leaf covered walkway, breaking both ankles and her leg, and is now permanently disabled.

After her claim with the Army was denied, she filed suit for her injuries against the United States pursuant to the Federal Tort Claims Act ("FTCA") 28 U.S.C. §§ 2671 *et. seq*. Prior to trial, the government moved to dismiss appellant's complaint pursuant to Fed.R.Civ.P. 12(b)(1), arguing that the action was barred under the discretionary function exception to the FTCA. Appellant opposed that motion, filing a memorandum and supporting documents.

The trial court granted the government's motion to dismiss on the pleadings, without a hearing, issuing an order and memorandum opinion, attached hereto as Exhibit B. In a 2-to-1 decision, the Fourth Circuit affirmed. A motion for rehearing, or in the alternative, suggestion for rehearing en banc, was denied by the Fourth Circuit on a 6-to-5 vote. This petition follows.

A. The District Court Opinion

Both the district court, and later, the court of appeals, sought to apply the two-part *Berkovitz-Gaubert* test[2] to determine if the government was immune from suit based on the discretionary function exception to the FTCA.

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[1]This conclusion--that the walk had become a "safety hazard to the public"-- was endorsed by Superintendent John C. Metzler, Jr., the highest ranking Army employee at Arlington.

[2]*United States v. Gaubert*, 499 U.S. 315, 321 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

As to the first prong of *Berkovitz-Gaubert*--whether the conduct at issue is proscribed by a particular statute, regulation or policy--the district court found that an Army publication, AP 290-5, directed that cemetery walks not present a hazard to pedestrians, and that warning signs be posted to warn the public of hazards.

However, the district court determined that since AP 290-5 did not define what constitutes a "hazard," the decision whether to declare something a hazard and to post warning signs was discretionary with Cemetery officials. Accordingly, the district court held that first prong of *Berkovitz-Gaubert* was met.

As to the second prong of *Berkovitz-Gaubert*--whether the action or decision was grounded in considerations of public policy--the district court simply stated that "decisions regarding when to repair steps and post warning signs require considering factors such as safety, aesthetics and available financial resources." Such factors, the court declared, are based on considerations of public policy.

B. The Appellate Court Opinion

In a 2-to-1 decision, the United States Court of Appeals for the Fourth Circuit affirmed. As to the first prong of *Berkovitz-Gaubert*, the majority held that AP 290-5 mandating repairs or warning signs, did not constitute a "policy," but merely a guide, which the superintendent was free to follow or ignore.

As to the second prong of *Berkovitz-Gaubert*, the majority agreed with the district court's flat assertion that decisions regarding the maintenance and repair of walk-ways and the posting of warning signs necessarily involve public policy considerations.

The dissent argued that the majority ignored the fact that the case involved the failure to warn of a known danger. Citing to the Ninth Circuit opinion in *Faber v. United States*, 56 F.3d 1122, 1125 (1995), the dissent found that FTCA

failure-to-warn cases involve considerations of safety, not public policy.

Accordingly, in FTCA failure-to-warn cases, the dissent argued that the discretionary function exception must be limited to those unusual situations where the government was required to engage in broad, policy-making activities, or to consider unique social, economic, and political circumstances in the course of making judgments related to safety. Finding no such factors in this case, the dissent concluded that the government failed to meet the second prong of *Berkovitz-Gaubert.*

REASONS FOR GRANTING THE PETITION

The application of the FTCA's discretionary function exception to the government's duty to warn of known, dangerous conditions is an issue of exceptional importance.

First, review is sought to insure uniformity among the circuits regarding what type of public policies justify the government not warning invitees of known hazards. The Fourth Circuit stands alone in holding that virtually any public policy consideration overrides safety issues, making the government virtually immune from suit for failing to warn of known dangers.

The Ninth[3], Third[4], Tenth[5] and D.C. Circuits[6] agree with the Fourth Circuit dissenter, holding that in FTCA failure-to-warn cases, the discretionary function exception is limited to those unusual situations where the government was required to engage in broad, policy making activities, or to consider unique social, economic, and political circumstances in the course of making judgments related to safety.

Secondly, guidance from this Court is necessary to articulate what type of evidence plaintiff must present to

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[3]*Faber v. United States*, 56 F.3d 1122 (9th Cir. 1995).

[4]*Andrulonis v. United States*, 954 F.2d 652 (3rd Cir. 1991).

[5]*Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989).

[6]*Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995).

establish a government "policy" under the first prong of the Berkovitz-*Gaubert* test.

In the instant case, the Army's manual for the operation of Arlington National Cemetery[7], states that

> "cemetery drives and walks must not present a hazard to...pedestrians...if immediate repairs cannot be made, barriers will be erected or other steps taken to prevent accidents."

Petitioner argued below that this language constituted an official policy of the Cemetery, which Cemetery officials were compelled to follow. The lower courts disagreed.

This Court has held that the discretionary function exception does not apply where "a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive." *United States v. Gaubert*, 499 U.S. 315, 321 (1991);*Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Since federal statutes or regulations rarely, if ever, prescribe when a government official must warn of known hazards, the necessity of establishing what constitutes an "official policy" under *Berkovitz-Gaubert* is of tantamount importance, and has not been uniformly resolved at the Federal Circuit Court level.

I. The Appellate Court Erred in Dismissing Petitioner's Action

The parties concur that courts must apply the two-part *Berkovitz-Gaubert* test to determine whether the government's conduct is shielded by the discretionary function exception to the Federal Tort Claims Act. *See Berkovitz v. United States*, 486 U.S. 531, 537 (1988); *United States v. Gaubert*, 499 U.S. 315, 323 (1991); 28 U.S.C. § 2680(a). This exception covers any government conduct or action that (1) involves an element of judgment or choice, and (2) is an action or decision

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[7]*Department of the Army Pamphlet* 290-5.

based on considerations of public policy. *Berkovitz* at 537;*Gaubert* at 323.

A. The Appellate Court Erred in Holding that the Army's Guide to the Operations of Arlington National Cemetery Did Not Constitute Cemetery Policy.

During pretrial discovery, petitioner made the following request for production of documents:

> Document Request #23. Any and all procedures, policies, directives, regulations, orders, codes, mandates or the like concerning the following, applicable to, or in force and effect, at the Arlington National Cemetery:
>
> a. maintenance;
> b. repairs;
> c. safety;
> d. loss prevention;
> e. pedestrian or visitor safety;
> f. sign use or placement.

In response, the government provided *AP 290-5*, entitled "Administration, Operation, and Maintenance of Army Cemeteries." This document was promulgated by the Secretary of the Army pursuant to Army Regulation 290-5 on May 1, 1991, and describes itself as "the procedures and policies for the administration, operation, and maintenance of Arlington National Cemetery."

According to its terms, this pamphlet is "a source of reference on cemetery administrative policies, regulations, procedures, and technical requirements." John C. Metzler, Jr., the Superintendent at Arlington, testified that Section 5-4 of *AP 290-5* contains the Cemetery's policy with regard to drives, walkways and drains. It reads in pertinent part:

> *b.* Cemetery drives and walks must not present a hazard to vehicles or pedestrians. They will be kept free of potholes and mounds. Cracks will be filled

> with joint compound to arrest deterioration and postpone major repairs. If immediate repairs cannot be made, barriers will be erected or other steps taken to prevent accidents.

As the official policy of the Cemetery, the government fails the first prong of *Berkovitz-Gaubert* because the prescriptive language of *Army Pamphlet* 290-5 removes the element of choice from Cemetery officials.

The government argued successfully below that AP 290-5 is merely a "guide" to making appropriate policy decisions, and therefore does not itself constitute "policy" under the first prong of *Berkovitz-Gaubert.*

The argument was accepted, even though the Cemetery's highest ranking official testified in deposition that AP 290-5 did constitute the Cemetery's policy regarding maintenance of walk-ways and warning signs. The government offered no evidence of a contrary policy. Indeed, the notion of a policy of not warning invitees of known, hidden dangers would be inconceivable.

This appellate court's narrow definition of established "policy" effectively reads the word "policy" out of this Court's prior decisions. In *Gaubert*, the Court refused to limit the mandatory requirement of the government official simply to federal "statutes" and "regulations." Petitioner submits that the inclusion of the term "policy" by the *Gaubert* Court was intended to allow plaintiffs to proceed, even if the conduct was never codified in a statute or regulation. An overly restrictive definition of "policy" would prevent plaintiffs from prevailing in important circumstances, such as the case at bar, where the duty to warn an invitee of hidden, known hazards too basic to bother codifying in a formal statute or regulation.

The Cemetery had a policy on walk-ways, which was embodied in AP 290-5. If the walk-way became a hazard to pedestrians, it was either to be promptly fixed, or appropriate warnings would be given to those likely to be injured. The violation of this policy gives a cause of action to petitioner.

B. The Appellate Court Erred in Concluding that the Cemetery's Decision Not to Warn Petitioner of a Known, Hidden Danger was Grounded in Public Policy.

Without discussion, the appellate court majority concluded that the decision not to repair the walk-way, which Cemetery officials had declared a hazard, and not to post appropriate warnings was

> tied to a variety of public policy considerations--including balancing public access with public safety, historical and cultural preservation, foster a somber and reflective atmosphere, and conserving natural as well as fiscal resources[8]

The dissent disagreed, concluding that "the government was not called upon to make broad, policy-based decisions, and no unique circumstances are present."

The majority opinion conflicts with decisions of the Ninth, Third, Tenth and D.C. Circuits, which agree with the Fourth Circuit dissenter, holding that in FTCA failure-to-warn cases, the discretionary function exception is limited to those unusual situations where the government was required to engage in broad, policy making activities, or to consider unique social,

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[8]The government argued below that the posting of warning signs would disturb the solemn atmosphere of the cemetery. However, there was nothing to prevent the government from warning permit holders by other means. In *Childers v. United States*, 40 F.3d 973 (9th Cir. 1994), for example, the Park Service provided warnings "through park brochures, visitor center displays, bulletin board information, and personal contact." *Id.* at 976. *See also Kiehn v. United States*, 984 F.2d 1100, 1105-06 (10th Cir. 1993)(National Park Service gave warnings of dangerous conditions through its concessionaires, who were to warn visitors); *Zumwalt v. United States*, 928 F.2d 951, 955 (10th Cir. 1991)(decision was made to place warnings in visitor pamphlet). The government provides no explanation as to why warnings in brochures, visitor center displays, bulletin board information, or by mail to permit holders, which would not effect the character of the Cemetery, were not used or attempted in this case.

economic, and political circumstances in the course of making judgments related to safety.

Where the government is a landowner, every official decision involves some consideration of public access, preservation of atmosphere, and use of fiscal resources. Nevertheless, only in the most unique circumstances, where true, broad, public policy issues are at stake, should the government be immune from suit for its failure to warn invitees of known, hidden dangers.

In *Faber v. United States*, 56 F.3d 1122 (1995), plaintiff sued the United States in tort for its failure to warn of the existence of diving hazards in a national park. Faber dove off a rock near the top of a scenic water falls into a pool, struck his head and suffered severe injuries. Faber alleged that the Forest Service was negligent in not posting signs warning of the danger of diving, even though an earlier Forest Service "site management plan" noted numerous diving accidents in the same area.

The district court granted summary judgment in favor of the United States on the basis that the discretionary function exception to the FTCA rendered the court without subject matter jurisdiction to adjudicate Faber's claim. The Ninth Circuit reversed, holding that a failure to warn involves considerations of safety, not public policy:

> ..it would be wrong to apply the discretionary function exception in a case where a low-level government employee made a judgment not to post a warning sign, or to erect a guardrail, or to make a safer path. Such a judgment would be no different than a judgment made by a private individual not to take certain measures to ensure the safety of visitors. To interpret such a judgment as discretionary would be too expansive an interpretation of Congress' intent in creating the discretionary function exception. *Id.* at 1125.[9]

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[9]*Accord, Sutton v. Earles*, 26 F.3d 903, 910 (9th Cir. 1994)(Navy's decision not to warn of a known water hazard was not the kind of social, economic, or policy decision the exception was intended to protect.)

In *Andrulonis v. United States*, 952 F.2d 652, 655 (3rd Cir. 1991), *cert. denied, 505* U.S. 1204 (1992), the Third Circuit held that a government scientist's failure to warn of obvious dangerous conditions in a state laboratory studying government supplied rabies virus could not implicate any policy considerations, and was not protected by the exception.

The same approach was taken by the 10th Circuit in *Boyd v. United States*, 881 F.2d 895,898, (10th Cir. 1989), which held that an alleged failure to warn swimmers of dangerous conditions in a swimming area does not implicate social, economic or political policy judgments. *Accord, Smith v. United States*, 546 F.2d 872 (10th Cir. 1976)(Park Service's failure to post warning of danger of collapsing thermal pool crusts not protected by discretionary function exception).

Finally, in *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995), the D.C. Circuit determine that while the Park Service's failure to maintain an adequate skid resistance on a road surface fell within the discretionary function exception, its failure to post adequate warning signs about the slippery surface did not. *Id.* at 450-51.

Thus, every other circuit which has considered the issue has refused to apply the discretionary function exception to ordinary failure-to-warn of known danger cases. The decision of the majority in this case conflicts with the above-cited authorities, and should be reversed.

CONCLUSION

Accordingly, Petitioner respectfully submits that the petition for writ of certiorari to the Fourth Circuit should be granted.

Respectfully Submitted,
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By Counsel

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June 24, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELLEN HIBBLE, Mrs.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 96-2180

October 27, 1997, Argued
January 7, 1998, Decided

NOTICE: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CA-96-465-A).

DISPOSITION: AFFIRMED.

COUNSEL: ARGUED: Karl George Feissner, FEISSNER & SLATKIN, Washington, D.C.; Paul Howard Zukerberg, Washington, D.C., for Appellant.

ARGUED: Thomas Mercer Ray, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

ON BRIEF: Helen F. Fahey, United States Attorney, James E. Macklin, Special Assistant United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES: Before WILKINSON, Chief Judge, HAMILTON, Circuit Judge, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation. Judge Hamilton wrote a dissenting opinion.

OPINION: PER CURIAM:

Ellen R. Hibble appeals the district court's dismissal of her Federal Tort Claims Act suit for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Finding no error, we affirm.

I.

During a visit to Arlington National Cemetery, Ellen R. Hibble ("Ms. Hibble") fell down a set of stairs on the "Custis Walk," fracturing both ankles and breaking her right leg. The location on Custis Walk where Ms. Hibble fell was covered with leaves which concealed broken concrete and round concrete stones that had broken off from the walkway. No signs or barriers were erected to warn the public of any potential hazard.

Ms. Hibble subsequently filed suit for her injuries under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 et seq. Prior to trial, the government moved to dismiss her complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), arguing that the action was barred under the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a). The district court granted the government's motion, holding that the discretionary function exception applied in the instant case because (1) no federal statute, regulation, or policy specifically prescribed a course of action for the Superintendent of Arlington National Cemetery, thus leaving the operations of the cemetery to his discretion; and (2)

the Superintendent's discretionary decisions were based on considerations of public policy.

II.

The FTCA provides a limited waiver of federal sovereign immunity for tort claims. *United States v. Orleans*, 425 U.S. 807, 48 L. Ed. 2d 390, 96 S. Ct. 1971 (1976); *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993). There are several enumerated exceptions to this waiver, however, the most relevant for purposes of this appeal being the discretionary function exception. 28 U.S.C. § 2680(a).[1] Pursuant to the discretionary function exception, a court lacks subject matter jurisdiction over any suit concerning government conduct that (1) involves an element of judgment or choice, and (2) is an action or decision based on considerations of public policy. *Berkovitz v. United States*, 486 U.S. 531, 537, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988); *United States v. Gaubert*, 499 U.S. 315, 323, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991). The requirement of judgment or choice is not satisfied, however, if "'a federal statute, regulation, or policy specifically proscribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Gaubert*, 499 U.S. at 322 (quoting *Berkovitz*, 486 U.S. at 536). In fact, if a regulation mandates particular conduct and the government employee violates that regulation, "there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." Id. at 324.

Ms. Hibble argues that with respect to her situation, there was an applicable regulation or policy, namely Army Pamphlet ("AP") 290-5, which required either the immediate repair of the hazardous conditions on Custis Walk, or the

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[1]Under 28 U.S.C. § 2680(a), federal sovereign immunity is not waived for:

> any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the federal agency or an employee of the Government, whether or not the discretion involved be abused.

erection of barriers or warning signs. Although it states in the introduction to AP 290-5 that "this pamphlet describes the procedures and policies for the administration, operation, and maintenance of Arlington National Cemetery," it also explicitly states that AP 290-5 is merely "a guide" and not a mandatory directive. AP 290-5. Furthermore, Army Regulation ("AR") 25-30 makes clear that pamphlets[2] such as AP 290-5 are not included among the list of "publications that will be used to issue departmental policy." AR 25-30, ch. 2, § 1, 2-2b. Thus, contrary to Ms. Hibble's assertion, we find that AP 290-5 does not qualify as the sort of "federal statute, regulation, or policy" which would preclude the application of the discretionary function exception. There being no mandatory statute, regulation, or policy specifically prescribing a course of action for the Superintendent of Arlington National Cemetery, we find that the first prong of the Berkovitz-Gaubert test is satisfied.

As to the second prong--that the discretionary decisions be based on public policy considerations--we concur with the district court's findings. Decisions regarding leaf removal, the maintenance and repair of grounds and walkways, the posting of warning signs, and the closure of portions of the cemetery are inextricably tied to a variety of public policy considerations--including balancing public access with public safety, historical and cultural preservation, fostering a somber and reflective atmosphere, and conserving natural as well as fiscal resources.

Accordingly, we find that the district court correctly determined that the discretionary function exception applies in the instant case and properly granted the government's Motion to Dismiss.

AFFIRMED

DISSENTBY: HAMILTON

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[2]AR 25-30 defines a Department of the Army Pamphlet as "[a] permanent instructional or informational publication." AR 25-30, ch. 2, § 2 at 111 (emphasis added).

DISSENT: HAMILTON, Circuit Judge, dissenting:

The government knew as far back as 1991 that Custis Walk presented a known danger to pedestrians using the walk.[1] Despite its knowledge of the danger, the government failed to warn the public of its existence, even though leaves covering Custis Walk in the fall and winter months obscured the danger. As a consequence, Ms. Hibble, who was at the Arlington National Cemetery visiting the graves of some family members in December 1994, slipped and fell on the leaf covered Custis Walk, the only pathway back to her car, breaking both ankles and her right leg. As a result of her injuries, Ms. Hibble is disabled.

The majority concludes that the government met the second prong of the Berkovitz-Gaubert analysis[2] because "decisions regarding leaf removal, the maintenance and repair of grounds and walkways, the posting of warning signs, and the closure of portions of the cemetery are inextricably tied to a variety of public policy considerations--including balancing public access with public safety, historical and cultural preservation, fostering a somber and reflective atmosphere, and conserving natural as well as fiscal resources." Ante at 4. Critically, the majority ignores that this case involves a failure to warn. FTCA failure-to-warn cases involve "considerations of safety, not public policy." *Faber v. United States*, 56 F.3d 1122, 1125 (9th Cir. 1995). Accordingly, in FTCA failure-to-warn cases, the discretionary function exception is limited "to those

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[1] The evidence on this point is indisputable. After performing a detailed site inspection of Custis Walk at the request of the Superintendent of the Cemetery, Hank Masser, an engineer with the Army Corps of Engineers, concluded that "due to its deteriorated condition and heavy volume of tourist traffic, the walk is a potential safety hazard to the public." (J.A. 176). Furthermore, just one month after Ms. Hibble fell, the Cemetery's chief engineer, the Chief of the Army Corps of Engineers, the Chief of the Army Contracting Division, and the Chief of the Army Construction Operations Division all agreed to a written restoration plan for Custis Walk. Specifically, that plan states: "Due to the deteriorated condition of the walk it has become a safety hazard to the public." (J.A. 283).

[2] I agree with the majority that the government met the first prong of the Berkovitz-Gaubert analysis.

unusual situations where the government was required to engage in broad, policy-making activities or to consider unique social, economic, and political circumstances in the course of making judgments related to safety." Id.

In this case, the government was not called upon to make broad policy-based decisions and no unique circumstances are present. This case is about the government's failure to warn Ms. Hibble of the danger that Custis Walk presented to pedestrians. The circumstances of this case are no different than a tort claim against a private individual who has failed to warn of a known danger on his or her property. When, as in this case, the governmental negligence is essentially identical to that performed by a private citizen, no broad policy decision or unique circumstances are present. Accordingly, the government failed to meet the second prong of the Berkovitz-Gaubert analysis. I, therefore, respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELLEN HIBBLE, Mrs.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 96-2180

October 27, 1997, Argued
January 7, 1998, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, Chief District Judge. (CA-96-465-A).

OPINION: AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ELLEN HIBBLE,

Plaintiff,

v. Civil Action 96-465-A

UNITED STATES OF AMERICA,

Defendant,

MEMORANDUM OPINION

This matter comes before the Court on defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Defendant contends that this action is barred under the "discretionary function" exception to the Federal Tort Claims Act ('FTCA'). 28 U.S. C. §§ 2671 et seq. On December 8, 1994, plaintiff Ellen Hibble was visiting family grave sites at Arlington National Cemetery ("the Cemetery"). While descending a series of long steps on the "Custis Walk," plaintiff fell, fractured both ankles and her right leg, and is permanently disabled as a result. The location on the steps where plaintiff fell was covered with leaves which concealed broken concrete and round concrete stones that had broken off from the Walk. The U.S. Army Corps of Engineers concluded after inspecting the walkway that the condition of the stairway at the time of plaintiff's accident was "deteriorated" with cracking and settlement problems.

The administration, operation and maintenance of the Cemetery is governed by Army Pamphlet 290-5 ("the Pamphlet"). Section 5-4 of the Pamphlet addresses the maintenance of roads, drives, walks and drains. Cemetery Superintendent John C. Metzler, Jr. testified that he refers to

the Pamphlet as a "reference guide" for his administrative decisions.

The FTCA provides a limited waiver of federal sovereign immunity for claims grounded in tort. Bowman v. United States, 820 F.2d 1393, 1395 (4th Cir. 1987)(citing United States v. Yellow Cab Co., 340 U.S. 543 (1951)). One of the most significant limitations on this waiver is the "discretionary function" exception. 28 U.S.C. § 2680(a). The discretionary function exception covers government conduct that (1) involves an element of judgment or choice and (2) is an action or decision based on considerations of public policy. Berkovitz v. United States 486 U.S. 531, 537 (1988); United States v. Gaubert, 499 U.S. 315, 323 (1991). However, "[t]he requirement of a judgment or choice is not satisfied if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow' because 'the employee has no rightful option but to adhere to the directive'" Gaubert, 499 U. S. at 322 (quoting Berkovitz, 486 U.S. at 536). If an applicable regulation mandates particular conduct and the government employee violates the regulation, "there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." Id. at 324.

In the instant case, section 5-4(b) of the Pamphlet specifies that cemetery walks must not present a "hazard" to pedestrians. However, the Pamphlet does not define what constitutes a "hazard," nor does it mandate how or when Cemetery employees must remove or repair hazards. These questions are clearly left to the discretion of the Superintendent of the Cemetery and his subordinates. See United States v. Varig Airlines, 467 U.S. 797, 811 (1984)(quoting Dalehite v. United States, 346 US. 15, 34 (1953)). The same can be said of section 5-4(g)'s reference to temporary signs that are "necessary" to warn the public of hazards. Nowhere in this section is "hazard" defined, nor is it mandated that Cemetery employees erect temporary signs. Section 5-
4(g) simply states that employees need not seek specific authorization from the Superintendent before they erect temporary signs. Moreover, since the term "necessary" is left undefined, it is left to the discretion of the Cemetery employee to determine when a sign must be posted to warn the public.

See Bowman, 820 F.2d at 1395. Accordingly, the first prong of the test is met.

The second prong of the Berkovitz-Gaubert test is also met. Decisions regarding when to remove leaves, repair steps and post signs require considering factors such as safety, aesthetics and available financial resources. Such factors are based on considerations of public policy. Gaubert, 499 U.S. at 325; 467 U.S. at 814.

For these reasons, the discretionary function exception applies in the instant case an this Court is without subject matter jurisdiction. Accordingly, defendant's motion to dismiss should be granted.

An appropriate order shall issue.

/s/Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ELLEN HIBBLE,

Plaintiff,

v. Civil Action No. 96-465-A

UNITED STATES OF AMERICA

Defendant,

ORDER

This matter came before the Court on defendant's motion to dismiss pursuant to Fed. R Civ. P. 12(b)(1) for lack of subject matter jurisdiction in Civil Action No. 96-465-A. In accordance with the accompanying memorandum opinion, it is hereby

ORDERED that the defendant's motion is GRANTED and this case is DISMISSED.

/s/Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
August 19, 1996

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELLEN HIBBLE, Mrs.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 96-2180 (CA-96-465-A)

ORDER

Appellant filed a petition for rehearing with suggestion for rehearing en banc.

A member of the Court requested a poll of the Court on the suggestion for rehearing en banc, and a majority of the Court voted to deny the rehearing en banc. Chief Judge Wilkinson, and Judge Widener, Wilkins, Niemeyer, Luttig, and Williams voted against rehearing en banc, and Judges Murnaghan, Ervin, Hamilton, Michael, and Motz voted to rehear the case en banc.

It is ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Chief Judge Wilkinson for the Court.

For the Court

/s/ Patricia S. Conner
Clerk

FILED: March 27, 1998.

(2)

FILED
AUG 24 1998

No. 97-2077

In the Supreme Court of the United States

OCTOBER TERM, 1997

ELLEN R. HIBBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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HARP

QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), applies to a decision not to repair or to warn visitors about deterioration of a historic walkway at Arlington National Cemetery.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-2077

ELLEN R. HIBBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-6) is unpublished, but the judgment is noted at 133 F.3d 915 (Table). The opinion of the district court (Pet. App. B 1-3) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 7, 1998. A petition for rehearing was denied on March 27, 1998. Pet. App. C. The petition for a writ of certiorari was filed on June 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671, *et seq.*, waives federal sovereign immunity for specified tort claims against officers and agencies of the United States. Congress excepted from this waiver claims arising from federal officials' performance of discretionary functions. Section 2680(a) of Title 28 exempts from suit

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. a. Congress has charged the Secretary of the Army with the development and operation of Arlington National Cemetery. 24 U.S.C. 278 (1970).[1] Army Regulation 290-5 establishes the authority and assigns responsibility for operation of the Cemetery. See Army Reg. 290-5 (Sept. 1, 1980) (reproduced at C.A.J.A. 83-102). The Regulation directs that the Cemetery be established as a "permanent national shrine[ ] provided by a grateful nation to the honored dead of the Armed Forces of the United States." *Id.* at 91. The Regulation further instructs that the "standards for construction, maintenance, and operation of

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[1] While this provision was repealed by Section 7(a) of the National Cemeteries Act of 1973, Pub. L. No. 93-43, 87 Stat. 82, Section 7(b) of that Act (87 Stat. 88) provided that nothing in the repeal would affect in any manner the functions, powers, and duties of the Secretary of the Army regarding Army national cemeteries.

[the Cemetery] will be commensurate with the high purpose to which [it is] dedicated." *Ibid.*

b. Army Pamphlet 290-5 (Pamphlet) outlines administrative and maintenance goals for the Cemetery. Dep't of the Army Pamphlet 290-5, *Administration, Operation, and Maintenance of Army Cemeteries* (May 1, 1991) (reproduced at C.A.J.A. 118-170). The Pamphlet "serves as a guide to aid in discharging duties for the accomplishment of the overall Army cemetery mission" and as a "source of reference" for administrative policies and procedures. C.A.J.A. 121; see also Pet. App. A 4. Army Regulation 25-30 additionally provides that Army pamphlets are not the type of "publications that will be used to issue departmental policy." Army Reg. 25-30, ch. 2, § 1, 2-2 (March 27, 1989) (reproduced at C.A.J.A. 401).

Section 5-4 of the Pamphlet addresses the maintenance of roads, drives, walks, and drains. Pet. App. B 1; Pet. 3; C.A.J.A. 135. It states that Cemetery walks must not present a "hazard" to pedestrians. Pet. 3; C.A.J.A. 135. The Pamphlet does not define what constitutes a "hazard," nor does it specify how or when Cemetery employees must respond to hazards that develop. *Ibid.*; Pet. App. B 2. The Pamphlet provides only that, "[i]f immediate repairs cannot be made, barriers will be erected or other steps taken to prevent accidents." Pet. 3; C.A.J.A. 135. Section 5-4(g) permits, but does not require, the posting of signs warning of hazards. *Ibid.*

c. The Custis Walk, which provides the primary route of pedestrian access between the cemetery entrance and the Custis-Lee Mansion, is a pathway of special historical significance within the Cemetery. The Walk was constructed in 1879 to track Robert E. Lee's historic path as he departed the Custis-Lee mansion for the last time en route to Richmond, Virginia, the Confederate Capital.

C.A.J.A. 22, 40; see also *id.* at 31, 41 (discussing historical and architectural value of the Custis Walk).

3. During a visit to family grave sites at Arlington National Cemetery, petitioner fell while descending a series of steps on the Custis Walk. Pet. App. A 2. Petitioner fractured both ankles and her right leg, and is permanently disabled as a result. Pet. App. B 1. The area of the Custis Walk where petitioner fell was covered with leaves, which concealed broken concrete and stones that had broken off from the walkway. Pet. App. A 2. No signs or barriers warned the public of the potential hazard. *Ibid.*

4. After exhausting her administrative remedies with the Army, petitioner filed suit under the Federal Tort Claims Act. Pet. App. A 2; C.A.J.A. 11 (Complaint). The government moved for dismissal, arguing that the action was barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a).

The district court granted the government's motion and dismissed the case. Pet. App. B 1-3. The district court held that no federal statute, regulation, or policy specifically prescribed a course of action at the Cemetery regarding maintenance of the Custis Walk, thus leaving that matter to the Army's discretion. The Pamphlet failed to define a "hazard" to the public, to identify when warning signs were "necessary," or to prescribe how "hazards" would be alleviated once identified. *Id.* at B 2. The district court further found that the Army's discretionary decisions involving the Custis Walk were based on considerations of public policy. Pet. App. B 3 ("Decisions regarding when to remove leaves, repair steps and post signs require considering factors such as safety, aesthetics and available financial resources.").

5. The court of appeals affirmed. Pet. App. A 1-6. The court of appeals agreed with the district court that the

Pamphlet did not mandate specific actions or responses to the deterioration of the Custis Walk, leaving the matter within the discretion of cemetery officials. *Id.* at A 4. The court of appeals further agreed that decisions about leaf removal, maintenance of grounds and walkways, posting of warning signs, and closure of portions of the Cemetery were "inextricably tied to a variety of public policy considerations—including balancing public access with public safety, historical and cultural preservation, fostering a somber and reflective atmosphere, and conserving natural as well as fiscal resources." *Ibid.*[2]

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with the decisions of this Court or of any other court of appeals. Petitioner's claim seeks review only of how two courts consistently applied the correct legal test to the specific facts of her case. That claim does not merit this Court's review.

1. The decision of the court of appeals is consistent with the rulings of this Court. Both the district court and the court of appeals applied the two-prong test for identifying discretionary functions established by this Court's decisions in *United States* v. *Gaubert*, 499 U.S. 315 (1991), and *Berkovitz* v. *United States*, 486 U.S. 531 (1988). See Pet. App. A 3-4, B 2-3. Further, as required by that test (*Gaubert*, 499 U.S. at 324-325; *Berkovitz*, 486 U.S. at 544-545), both courts found that decisions regarding the maintenance and repair of the Custis Walk (1) were not

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[2] Judge Hamilton agreed that the cemetery officials retained discretion in dealing with maintenance of the Custis Walk (Pet. App. A 5 n.2), but disagreed with the application of the discretionary function exception because the government "was not called upon to make broad policy-based decisions and no unique circumstances are present," *id.* at A 6.

dictated by statute or regulation, but instead involved elements of judgment and choice, and (2) the discretionary decision-making reflected or was susceptible to public policy considerations. Pet. App. A, B 2-3.

Petitioner agrees (Pet. 7) that the correct legal test was applied, but disagrees with the outcome (Pet. 7-12). That claim presents no question of broad or enduring importance; it seeks only the correction of alleged error, which does not customarily warrant this Court's review. See *Sumner* v. *Mata*, 449 U.S. 539, 543 (1981). Pure error review is particularly unjustified where, as here, the district court and the court of appeals both agreed in their assessment of the record and their application of the proper legal standard to it. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), adhered to on reh'g, 339 U.S. 605 (1950); see also *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996).

Petitioner also seeks this Court's review (Pet. 8-9) of the court of appeals' determination that the Pamphlet left discretion in cemetery officials regarding the posting of warning signs along the Custis Walk. Whether the Pamphlet constitutes a mandatory directive for purposes of the first prong of the *Berkovitz/Gaubert* test, however, is a question of fact that was determined against petitioner by both the district court and the court of appeals. Pet. App. A 4, B 2-3. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

In any event, both courts correctly recognized that the Pamphlet fails to state how or when Cemetery employees must remove or repair hazards on walkways, or when a "hazard" will be held to have arisen. The Pamphlet, moreover, explicitly states that it is merely a guide. See *Cope* v. *Scott*, 45 F.3d 445, 451 (D.C. Cir. 1995) (manual that operates as guidebook preserves discretion in

government officials). Army Regulation 25-30 further explains that such pamphlets are not among those publications that are used to issue departmental policy. Pet. App. A 4; C.A.J.A. 401. While the Pamphlet establishes as one of its goals the protection of the public, it also leaves cemetery officials with discretion to decide when protective measures are necessary and what steps should be taken consistent with the solemn purpose and memorial atmosphere of the cemetery. It is precisely in such situations that this Court has held the discretionary function exception applicable. *E.g.*, *Gaubert*, 499 U.S. at 325-326.

2. Petitioner contends (Pet. 6, 10-12) that the determination that the cemetery officials' failure to post warning signs was based on public policy considerations conflicts with the decisions of four other circuits in failure-to-warn cases. None of the cases petitioner cites, however, established a broad rule limiting the discretionary function exception in failure-to-warn cases. Rather, each decision reflects the highly fact- and context-specific nature of discretionary function determinations. As a result, other failure-to-warn cases from those same circuits have found the discretionary function exception applicable and, in particular, have ruled that public policy considerations can underlie a decision not to erect warning signs. Compare *Faber* v. *United States*, 56 F.3d 1122, 1123, 1126-1128 (9th Cir. 1995) (where other warning signs had already been erected at site and relevant rules left the agency no discretion, discretionary function exception inapplicable to failure-to-warn claim); *Cope* v. *Scott*, 45 F.3d 445, 451-452 (D.C. Cir. 1995) (where 23 traffic warning signs were already posted, failure to warn of slippery road conditions did not fall within discretionary function exception); *Andrulonis* v. *United States*, 952 F.2d 652, 655 (2d Cir. 1991) (failure to warn of laboratory

conditions conducive to transmission of rabies virus not a discretionary function), cert. denied, 505 U.S. 1204 (1992); and *Boyd* v. *United States*, 881 F.2d 895, 898 (10th Cir. 1989) (failure to warn swimmers in a popular swimming area not susceptible to policy analysis), with *Valdez* v. *United States*, 56 F.3d 1177, 1180 (9th Cir. 1995) (Park Service decisions regarding maintenance of park trails, posting of warning signs, and other safety precautions involve competing policy considerations falling within discretionary function exception); *Childers* v. *United States*, 40 F.3d 973, 976 (9th Cir. 1994) (decisions regarding the posting of warning signs on Yellowstone National Park trails based on public policy factors are within discretionary function exception), cert. denied, 514 U.S. 1095 (1995); *Kiehn* v. *United States*, 984 F.2d 1100, 1103-1105 (10th Cir. 1993) (decision not to place warning signs near petroglyphs at Dinosaur National Monument involved balancing public policy objectives of resource allocation, visitor safety, and scenic preservation); *Zumwalt* v. *United States*, 928 F.2d 951, 955 (10th Cir. 1991) (maintenance and placement of warning signs on trail at Pinnacles National Monument required a balancing of social, economic, and political policies).

As those cases recognize, the proper inquiry is not whether the policy considerations were "broad" or "unique" (Pet. 6), but whether the discretionary decision "is grounded in the policy of the regulatory regime." *Cope*, 45 F.3d at 449; see also *Gaubert*, 499 U.S. at 323, 325. The cases cited by petitioner (Pet. 11-12) concern dangerous driving conditions, rabies contamination, and the zoning of swimming areas, not the management of historic and scenic walkways within a national park. The policy considerations invoked by the relevant government officials in the cases petitioner relies upon thus did not pertain to the underlying regulatory programs. See

Faber, 56 F.3d at 1127 & n.4 (comparing situations where decision to erect warning signs does and does not implicate relevant public policy considerations); *Cope*, 45 F.3d at 452 (aesthetic considerations do not trigger exception where relevant roadway is managed as a commuter route with no less than 23 traffic control signs already in existence); *Andrulonis*, 952 F.2d at 655 (government's failure to warn "'cannot be said to be based on the purposes the regulatory regime seeks to accomplish'") (quoting *Gaubert*, 499 U.S. at 324 n.7); *Boyd*, 881 F.2d at 898.

In the present case, by contrast, the policy considerations balanced by cemetery officials—maintaining a somber and reflective atmosphere, ensuring public access, preserving the history and culture of the cemetery, and conserving natural resources—directly relate to the overall regulatory mission of establishing and operating a national shrine dedicated to the country's honored dead. The special historical significance and role of the Custis Walk magnify the importance to cemetery officials of weighing aesthetic, atmospheric, and public access concerns before erecting warning signs. See *Cope*, 45 F.3d at 452 (for purposes of discretionary function analysis, posting of warning signs along a commuter road cannot be compared to "the Grand Canyon's Rim Drive, nor Shenandoah's Skyline Drive").[3]

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[3] Even if a conflict existed between the court of appeals' ruling here and the decisions of other circuits, it would not be a mature inter-circuit conflict warranting this Court's review. The court of appeals' opinion is unpublished and thus does not represent the law of the circuit and has limited precedential value. See 4th Cir. R. 36(a), (b) & (c).

Because the court of appeals' decision is correct and comports with the rulings of other courts, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998